IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE PIUS C.KURIAKOSE

FRIDAY, THE 15TH JUNE 2007 / 25TH JYAISHTA 1929

WP(C).No. 38430 of 2003(Y)

PETITIONERS:

T.HAMEED, S/O.THAYAL MOHAMMED,
MELPPARAMBA, P.O.KALNAD, KASARAGOD DISTRICT.

BY ADV. SRI.D.KRISHNA PRASAD
SRI.D.NARENDRANATH
SRI.JOJI VARGHESE
SRI.M.HARISHARMA
SRI.T.P.ELDHOSE

RESPONDENTS:

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1. **T.ABDULLA HAJI, S/O.THAYAL MOHAMMED,**
   RESIDING AT BEKAL, PALLIKKARA VILLAGE,
   HOSDURG TALUK, P.O. BEKAL.

2. **T.ABDULRAHIMAN, S/O.THAYAL MOHAMMED,**
   RESIDING AT BEKAL, PALLIKKARA VILLAGE,
   HOSDURG TALUK, P.O.BEKAL.

3. **T.HASSAIN, S/O.THAYAL MOHAMMED,**
   RESIDING AT BEKAL, PALLIKKARA VILLAGE,
   HOSDURG TALUK, P.O. BEKAL.

4. **T.MOOSA, S/O.THAYAL MOHAMMED,**
   RESIDING AT BEKAL, PALLIKKARA VILLAGE,
   HOSDURG TALUK, P.O.BEKAL.

5. **M.P.FATHIMA, W/O.T.ABDULRAHIMAN,**
   RESIDING AT BEKAL, PALLIKKARA VILLAGE,
   HOSDURG TALUK, P.O. BEKAL.

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6. FAUSIA, D/O.T.ABDUL RAHIMAN,
RESIDING AT BEKAL,PALLIKKARA VILLAGE,
HOSDURG TALUK, P.O.BEKAL.

7. MUMTHAS, D/O.T.ABDULLE,
RESIDING AT BEKAL, PALLIKKARA VILLAGE,
HOSDURG TALUK, P.O.BEKAL.

8. ITTAMMAL ABDULLA, ALIAS MOLLAKIRIYATH ABDULLA, S/O.LATE KUNHAMMED, RESIDING AT ITTAMMAL, BELLA VILLAGE, HOSDURG TALUK, P.O. KANHANGAD.

9. ITTAMMEL HASSAN K.AHAMMED ALIAS MOILAKIRIYATH HASSAN, S/O.LATE MUHAMMED RESIDING AT ITTAMMEL, BELLA VILLAGE, HOSDURG TALUK, P.O.KANHANGAD.

10. ITTAMMAL HAMSA ALIAS MOLLAKIRIYATH HAMSA S/O.LATE KUHAMMED RESIDING AT ITTAMMAL, BELLA VILLAGE, HOSDURG TALUK, P.O. KANHANGAD.

11. ITTAMMAL ABOOBACKER ALIAS MOLLAKIRIYATH ABOOBACKER, S/O.LATE KUNHAMMED, RESIDING AT ITTAMMAL, BELLA VILLAGE, HOSDURG TALUK, P.O. KANHANGAD.

12. MOHAMMED SALIHA, S/O.T.ABDULLA,
RESIDING AT BAKEL, PALLIKKARA VILLAGE,
P.O.BEKAL.

*ADDL.R13 TO R18 ARE IMPLEADED:

R13. PATHUNHI, W/O.T.ABDULRAHIMAN,
RESIDING AT BEKAL, PALLIKKARE VILLAGE,
HOSDRUG TALUK, P.O.BEKAL.

R14. FOUZYA, D/O.T.ABDULRAHIMAN,
RESIDING AT BEKAL PALLIKKARE VILLAGE,
HOSDRUG TALUK, P.O.BEKAL.

R15. RAFEEQ S/O.T.ABDULRAHIMAN,
RESIDING AT BEKAL PALLIKKARE VILLAGE,
HOSDRUG TALUK, P.O.BEKAL.

R16. BADARUDEEN, S/O.T.ABDULRAHIMAN,
RESIDING AT BEKAL PALLIKKARE VILLAGE,
HOSDRUG TALUK, P.O.BEKAL.

R17. NIZAMUDEEN, S/O.T.ABDULRAHIMAN,
RESIDING AT BEKAL PALLIKKARE VILLAGE,
HOSDRUG TALUK, P.O.BEKAL.

R18. SUMAYYA, D/O.T.ABDULRAHIMAN,
RESIDING AT BEKAL PALLIKKARE VILLAGE,
HOSDRUG TALUK, P.O.BEKAL.

*ADDL.R13 TO R18 ARE IMPLEADED AS LR'S OF DECEASED 2ND RESPONDENT AS PER ORDER DTD. 20/06/05 IN I.A.8933/05.

BY ADV. SRI.S.V.BALAKRISHNA IYER (SR.) for R2,R5,R6,R7,R12
SRI.P.B.KRISHNAN
SRI.K.A.SHAJI MATHEW for R11
SRI.R.SURAJ KUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 15/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.38430/2003 Y

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF PLAINT DTD. 8/07/98 IN O.S.NO.51/1998 ON THE FILE OF THE SUB COURT, HOSDRUG.**

EXT.P2: **COPY OF ORDER DTD. 5/11/03 INO.S.NO.51/1998 ON THE FILE OF THE SUB COURT, HOSDRUG.**

/TRUE COPY/

KSS

PIUS C. KURIAKOSE,J.

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W.P.(C) No.38430 of 2003

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Dated: 15th June, 2007

JUDGMENT

The plaintiff in a suit for partition impugns Ext.P2 findings entered by the learned Subordinate Judge on issue No.10 which was one regarding the propriety of the valuation of the suit for the purpose of court fee. Ext.P1 is copy of the plaint which will show that the suit has been valued under Section 37(2) of the Court Fees and Suits Valuation Act on the allegation that the suit properties are in the joint possession and enjoyment of the plaintiff and the defendants. There were altogether 26 items of properties sought to be partitioned and as regards item Nos.1 to 8 and 11 to 26 the claim of the plaintiff was that the entire consideration for acquisition of those items was paid by the plaintiff and the defendants 1 and 2 out of their joint funds. As against item Nos.9 and 10 the claim was that those items belonged to the plaintiff and defendants 1, 2 and 8 to 11, having been acquired with their joint funds. Several contentions were raised by the respondents including the contention that the suit has not been properly valued and issue No.10 was raised on the basis of that contention. Even though several decisions of this court laying down that it is the allegations in the plaint which are to be considered for

the purpose of determining the payable court fee were cited before the learned Subordinate Judge and the Subordinate Judge did consider those decisions, ultimately relying on the judgment of a learned Single Judge of this court in **Ayisha v. Kunhimayan Haji** (ILR 1966 Kerala 17), the learned Subordinate Judge inferred that in respect of plaint schedule item Nos.3 to 10 and 12, 15 and 24 the defendants are in possession and concluded that the suit will have to be valued under Section 37(1) of the Court Fees and Suits Valuation Act, since it was conceded that documents in respect of those items stand in the name of the defendants.

2. Heard Mr.D.Krishna Prasad, learned counsel for the petitioner and Mr.S.V.Balakrishna Iyer, Senior Counsel for the contesting respondents.

3. Making submissions on the basis of the grounds raised in the Writ Petition, my attention was drawn by Mr.Krishna Prasad to various decisions including those reported as **Kunjanni v. Jacob** (1992(2) KLT 232), **Abdul Razack v. Anjaneyan** (2002(2) KLT 670), **Thankamma v. Unniama Antharjanam** (1964 KLJ 546).

4. Learned Senior counsel for the respondent would support the impugned order on the basis of the judgment in **Ayisha's** case

(supra).

5. Ext.P1 is copy of the plaint and a perusal of paragraphs 3, 6 and 9 therein will clearly show that it is specifically averred by the plaintiffs that the suit properties including plaint A schedule item Nos.3 to 10, 12, 15 and 24 are in joint possession of the parties and that consideration for the acquisition of those properties was paid by the plaintiff and the defendants 1 and 2 out of their joint funds. However, it is conceded in paragraphs 5 and 6 that the title deeds in respect of items 3, 4,5, 6 to 10, 12 and 15 to 24 stand in the names of the defendants. It is noticing this aspect of the matter that the learned Judge relied on the judgment of this court in **Ayisha's** case(supra) and held that it has to be presumed that the plaintiff is out of possession.

6. It is trite that for the purpose of determination of the payable court fee, all that is required is to look into the averments in the plaint. The contentions raised by the defendants in the written statement are not to be considered at all. Unless it is possible to say on the allegations in the plaint itself that the plaintiff is out of possession of the plaint schedule properties or any portion thereof, in a suit for partition valuation under Section 37(2) by the plaintiff

paying fixed court fee will have to be accepted. Learned Subordinate Judge has observed that the facts which obtain in the present suit are comparable to those in **Ayisha's** case (supra). A careful reading of the judgment in **Ayisha's** case would show that, that was a case for partition of the properties of a Moplah Marumakkathayam tharavad. In that case the court noticed that it had been virtually conceded that the plaintiff was out of possession as regards certain items which stood in the names of the sons-in-law of the karanavar of the tharavad. The court found that it had been admitted by the plaintiff himself through the averments in the plaint that the acquisition of those items by the sons-in-law of the karanavar of the tharavad though they were junior members of the tharavad, was to defeat the interest of the other members of the tharavad. The court also found on the basis of the averments in the plaint itself that the plaintiff did not have a case that at any point of time the plaintiff had been given any share in the income from those properties. It was on a cumulative appreciation of all the averments in the plaint that this court found in that case that the suit in so far as it related to those items had to be valued under Section 37(1). It is true that at more than one place in the judgment the learned Judge has highlighted the

fact that the title documents in relation to those properties stand in the name of the sons-in-law of the karavanavar. But the decision turned not on the circumstance that the title documents admittedly stood in the names of those defendants, but on the reason that it is admitted in the plaint itself that purchases were made by the karanavar in favour of those defendants in their capacities as his sons-in-law and not in their capacities as junior members of the tharavad. Had there been averments in the plaint in that line in the suit, perhaps the decision would have been different. It is significant to note that in respect of properties which stood in the individual name of the karanavar it was found under the same decision, in spite of an admission by the plaintiff that he had not been paid any share of income for the past 12 years prior to the institution of the suit, that the relief of partition of those properties can be valued under Section 37(2) itself. It has been reiterated in **Ayisha's** case itself that the question of court fees must be considered in the light of the allegations in the plaint and that a decision on the matter cannot be influenced either by the pleas in the written statement or by the impressions of the court on the merits of the matter. The averments in the plaint have to be accepted prima facie for determining the

payable court fee. Just because it is conceded that the document stands in the name of a stranger, the plaintiff shall not be insisted upon to pay ad valorem court fee under Section 37(1), if the plaintiff avers that the stranger is a name lender without possession and that the document is the result of fraud or collusion between the stranger and somebody who is co-owner along with the plaintiffs.

7. Thus, in my view, the facts in **Ayisha's** case (supra) decided by Vaidialingam,J. were different from the facts and pleadings which obtain in this case. The impugned order accordingly has to be set aside. I do so. It is held that the valuation of the suit under Section 37(2) of the Act as presently done by the plaintiff is proper.

The Writ Petition is allowed as above. No costs.

srd **PIUS C.KURIAKOSE, JUDGE**